IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1704

W.E. CAMPBELL, Superintendent of Public Instruction of the Commonwealth of Virginia, and THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA,
Appellants,

v.

DANIEL J. KRUSE, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF PROMISE AS AMICUS CURIAE IN SUPPORT OF THE APPELLEES' MOTION TO DISMISS THE APPEAL OR AFFIRM THE JUDGMENT OF THE DISTRICT COURT UNDER RULE 16

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INTEREST OF AMICUS CURIAE PROMISE

Pursuant to Rule 42 of the Rules of the Supreme Court of the United States, the instant Brief is filed on behalf of PROMISE with the consent of all the parties involved in this

proceeding in this Court and before the district court. The written consents of the several parties are being filed herewith with the Clerk of this Honorable Court. In addition, by Order entered May 27, 1977, PROMISE was permitted by the district court to participate as amicus curiae in all subsequent proceedings in that court. However, the participation of PROMISE as amicus curiae in this Court is pursuant to the consent provisions of Rule 42.

The interest of PROMISE in the instant case is profound because of its role as an unincorporated Virginia association serving as a coalition of constituent groups dedicated to the achievement of equal rights for handicapped persons and the enhancement of the ability of handicapped children to achieve to the very limits of their ability. A partial listing of the constituent groups for the purpose of demonstrating the depth of interest of amicus follows.

HEAR and VOICE are, respectively, Richmond metropolitan area and statewide groups concerned with the improvement of services for hearing-impaired children. The Virginia Association for Retarded Citizens is a statewide group with 44 local affiliated groups dedicated to securing services for the retarded individual, and his family, and to creating a greater public awareness of the needs and potential of retarded persons. The Virginia Association for Children with Learning Disabilities is similarly a statewide organization with numerous local affiliates concerned with the improvement of educational services for learning disabled children. The Fairfax Association for Children with Behavior Dysfunctions is a local group seeking the enhancement of services and programs for so-called emotionally disturbed children. The Council for Exceptional Children is a statewide organization comprised

primarily of educators and other professionals involved in the delivery of special educational services, and the improvement of the skills of those involved in service delivery programs. The Virginia Division of the American Association of University Women is a statewide group with 43 branches that, in part, is dedicated "to foster the development and maintenance of high standards of education . . . [and] . . . strengthen the fellowship among university women in order that their effect may be felt throughout the state in the solution of social and civic problems . . ." Other members of the PROMISE coalition were unable to be signatories to this brief but they are nonetheless equally committed to the improvement of special education services for handicapped children in Virginia.

This description of the component groups involved in PROMISE should clearly demonstrate the profound interest that PROMISE has in the instant proceedings as parents, professionals, and concerned citizens who recognize the failure of Virginia to live up to the promises made to these special children through the years, and who also believe that when any citizen is prevented from achieving his full potential, all citizens are diminished thereby.

In addition to the obvious interest of PROMISE as amicus curiae in seeking either the dismissal of this appeal or the summary affirmance of the decision of the district court, the constituent member groups involved in PROMISE and their individual members have insights into this litigation, and the laws and practices that prompted it, that are peculiar to their status as handicapped persons, the parents of handicapped children, the professional educators and others that work to remediate the handicapping conditions, and those citizens who seek the improvement of educational services for all.

PRELIMINARY STATEMENT

Amicus curiae PROMISE joins with Appellee Daniel J. Kruse, et al., in moving the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that no substantial parties in interest have appealed this case and that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument or review.

JURISDICTION

Appellants assert that the jurisdiction of this Court is conferred by 28 United States Code §1253.

ISSUES PRESENTED

1. Does This Court Have Jurisdiction To Entertain An Appeal In The Names Of W.E. Campbell As Superintendent Of Public Instruction Of The Commonwealth Of Virginia And The Board Of Education Of The Commonwealth Of Virginia Where No Substantial Relief Was Granted Against Campbell And The Board of Education Was Not A Party To The Proceedings In The District Court?

2. Does This Case Present A Substantial Question Demanding Review By This Court?

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution,
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of Virginia,
Article VIII, Section 1

The General Assembly shall provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth, and shall seek to ensure that an educational program of high quality is established and continually maintained.

Va. Code Ann. §22-10.8(a) (1976 Cum. Supp.)

"If a school division is unable to provide appropriate special education for a handicapped child, such education is not available in a State school or institution, and the parent or guardian of any such child pays or becomes obligated to pay for his attendance at a private nonsectarian school for the handicapped approved by the Board of Education, the school board of such division shall pay the parent or guardian of

such child for each school year three fourths of the tuition cost for each child enrolled in a special school for handicapped children; provided that the school board shall not be obligated to pay more than twelve hundred fifty dollars to the parent or guardian of each such child attending a nonresidential school nor to pay to the parent or guardian of each child attending a residential school more than five thousand dollars. The school board, from its own funds, is authorized to pay to the parent or guardian such additional tuition as it may deem appropriate. Of the total payment, the local school board shall be reimbursed sixty per centum from State funds as are appropriated for this purpose, which amount shall not exceed seven hundred fifty dollars for a handicapped child in a nonresidential school nor three thousand dollars for a handicapped child in a residential school; provided, however, that the local school board is not required to provide such aid if matching State funds are not available. In the event State funds are not available, the local school board shall pay the parent or guardian tuition costs of such child in an amount equal to the actual per pupil cost of operation in the average daily membership for the school year immediately preceding, and such school board shall be entitled to count such pupils and receive reimbursement from the basic school aid fund in the same manner as if the child were attending the public schools. Payment by a local school board pursuant to this subsection to a parent or guardian who is obligated to pay for a child's attendance at a private nonsectarian school for the handicapped shall be by a check jointly payable to such school and to such parent or guardian. Payment by a local school board pursuant to this subsection to reimburse a parent or guardian who has paid for a child's attendance at a private nonsectarian school for the handicapped shall be by check payable to the parent or guardian."

STATEMENT OF THE CASE

The Statement of the Case contained on pages six through nine of the Jurisdictional Statement filed by Appellants is satisfactory to amicus curiae with the exception of the following matters. That Statement refers to "two county school systems", "the Virginia Department of Welfare", and "the welfare departments of Henrico and Fairfax Counties" as parties defendant in the district court and yet the Amended Complaint that gave birth to this proceeding nowhere named these *agencies* as defendants, but rather the individual members of the various Boards and the Directors of the several agencies were named as parties, individually and in their official capacities. This is an important distinction as will be alluded to later. Second, the statement that the district court "did not criticize the program offered by these two counties" (Henrico and Fairfax) is not quite correct as the court indicated in footnote 8 to its Decree and Order that these systems must provide reimbursement for the full range of special education services as defined by state law, which they are not presently doing. Third, the Statement of the Case drafted by Appellants asserts that the plaintiffs had alleged in the Complaint that the welfare defendants "had taken custody of children, in violation of State law" and yet the correct allegation was that the practice in question was violative of federal law. Other than these discrepancies the Statement of the Case is an accurate summary of the proceedings in the district court.

ARGUMENT

I.

THIS HONORABLE COURT HAS NO JURISDICTION TO CONSIDER AN APPEAL FILED BY THE BOARD OF EDUCATION OF THE COMMONWEALTH OF VIRGINIA.

As pointed out previously, the defendants named in the Amended Complaint in this action were the individual members of the Board of Education of the Commonwealth of Virginia, and at no time was the Board itself as a separate and distinct legal entity before the district court as a party. The Amended Complaint named, among others, as parties defendant "VINCENT J. THOMAS, PRESTON C. CARUTHERS, BILLY W. FRAZIER, RICHARD P. GIFFORD, ELIZABETH G. HELM, ALLIX B. JAMES, WILLIAM B. POFF, THOMAS R. WATKINS, and ELIZABETH M. ROGERS, individually and in their official capacity as members of the Board of Education of the Commonwealth of Virginia." The Responsive Pleading filed on behalf of these defendants was captioned as follows: "ANSWER OF DEFENDANTS W.E. CAMPBELL, MEMBERS OF THE STATE BOARD OF EDUCATION, WILLIAM L. LUKHARD, AND MEMBERS OF THE STATE BOARD OF WELFARE, TO THE AMENDED COMPLAINT." Thus, it was the individual *members* of the Board that were at all times before the district court and the Decree and Order of the court consistently granted relief against "the defendant members of the State Board of Education" (See paragraphs (5) and (6) of the Decree and Order at App. 2 of the

Jurisdictional Statement).* Indeed, the Amended Complaint could not have sought relief against the School Board as a legal entity under 42 United States Code §1983. *Monroe v. Pape*, 365 U.S. 167 (1961). Consequently, this Honorable Court has no jurisdiction to entertain an appeal by any of the purported Appellants except W.E. Campbell.

W.E. Campbell, Superintendent of Public Instruction of the Commonwealth of Virginia, is the chief administrative and executive officer of the Department of Education and, as such, he primarily carries out the policies established by the members of the State Board of Education and his function is largely a ministerial one. Consequently, the relief granted by the district court is not so relevant to his role as will be the policies adopted by the members of the State Board in obedience to the court's Decree and Order.

II.

THE JUDGMENT OF THE COURT BELOW IS CLEARLY CORRECT.

As quoted above, the Constitution of Virginia in Article VIII, Section 1, mandates the provision "of free public elementary and secondary schools for all children of school age throughout the Commonwealth" and the General Assembly of Virginia attempted to give flesh to these bones insofar as handicapped children were concerned by the passage of progressive and far-reaching legislation in 1972. That legislation largely was impelled by the ratification of the

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*Hereinafter cited as (Juris. Statement, p.).

new State Constitution and by the recommendations of a legislative study group dealing with the problems of handicapped persons which were released just prior to the 1972 session of the Virginia General Assembly. Contrary to the assertions of the Appellants in their Jurisdictional Statement, the tuition assistance portion of that legislation was not included for the ludicrous purpose that it would "enable people to attend a private school who would otherwise not have the opportunity" (Juris. Statement, p. 11). The Report of the Virginia Advisory Legislative Council on *Needs of the Handicapped* stated two rationales for the tuition assistance program embodied in the predecessor to Section 22-10.8 of the Code of Virginia. First, it was to provide children with an education appropriate to their needs where no such education was provided in the public schools, and, second, it was to "induce the rapid expansion of special education classes in local school districts" (VALC Report, pp. 5, 10). In other words, it was for the dual purposes of meeting the State's constitutional obligation to educate "all children" and also to act as an expensive inducement to the development of less expensive public programs. The intent was that no further need would exist for such a tuition assistance program after July 1, 1976, but the existence of the program would allow for a gradual and rational development of full public special education.

The inertia of the State of Virginia, the State School Board, and the General Assembly have prevented this original timetable to be implemented. The decision of the court below has brought to fruition on constitutional grounds what was legislatively intended in 1972 on policy grounds. The point of this brief legislative history is to demonstrate the fallacies apparent in some of the basic assumptions made by

Appellants in their Jurisdictional Statement filed in this Honorable Court. The superficial history also shows that the holding of the court below, rather than being an extreme departure from the mainstream of constitutional law, is consistent with the legislatively stated aims of the Commonwealth of Virginia.

The Appellants bottom their attack on the Decree and Order of the court below on its alleged inconsistency with the decision of this Honorable Court in *Rodriguez v. San Antonio Independent School District*, 411 U.S. 1 (1973). This attack ignores the distinction Your Honors made in footnote 60 of that opinion where the Court noted, as pointed out below, that:

> If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people – definable in terms of their inability to pay the prescribed sum – who would be absolutely precluded from receiving an education. That case would present a far more compelling set of circumstances for judicial assistance than the case before us today (411 U.S. at 25).

The district court acknowledged that the instant case presented the very issue posited by the hypothetical situation alluded to by this Court – the essential deprivation of minimal education in the absence of an ability to pay tuition charges. The children represented by the plaintiff class fall into the category of the deprived children described by the Court just as precisely as if they were charged a tuition to attend the public schools, or if the public school education were conducted in a totally foreign tongue and the only

alternative education was one to be purchased by a tuition charge. In addition, in *Rodriguez*, this Court reluctantly acknowledged that there was no constitutional right to a public education that was federally guaranteed. Here, there is such a constitutional right guaranteed by the Virginia Constitution and the stipulation of that provision out of the case by counsel below cannot repeal it. Its efficacy remains nonetheless to provide the basic grounding of a right that must be administered in light of the equal protection clause of the Fourteenth Amendment to the United States Constitution. This is an equal protection case and amicus submits that Article VIII, Section 1, of the Virginia Constitution necessarily characterizes education as a fundamental right in Virginia.

Not only is this case an appropriate one for the application of the equal protection clause but the decision of the district court is essentially a narrow and conservative one. The court did not expansively address the broad issue of the existence of an abstract constitutional right to an appropriate education on behalf of all handicapped children, although many courts, state and federal, have previously done so without any fear and trembling. *See* Wald, "The Right to Education," 2 *Legal Rights of the Mentally Handicapped* 833 (B. Ennis & P. Friedman, eds. 1973); Handel, "The Role of the Advocate in Securing the Handicapped Child's Rights to an Effective Minimal Education," 36 Ohio State L.J. 349 (1975); Weintraub & Abeson, "Appropriate Education for All Handicapped Children: A Growing Issue," 23 Syracuse L. Rev. 1037 (1972); Herr, "Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded," 23 Syracuse L. Rev. 995 (1972); Note, "The Right to Education: A Constitutional Analysis," 44 Cincinnati

L. Rev. 796 (1975). The court here declined to rule so broadly but merely ruled that Section 22-10.8(a) of the Code of Virginia (1950), as amended, was constitutionally infirm under the equal protection clause "by virtue of its exclusion from a publicly supported and appropriate education of the plaintiff class of poor handicapped children, while providing the same for those handicapped children whose parents are affluent enough to take advantage of the tuition grants." (Juris. Statement, p. App. 14). This narrow scope of the district court's ruling disturbs amicus who believes a far more expansive determination to have been justified, but the very narrowness demonstrates the insubstantiality of the issues presented by the instant appeal. The decision of the district court in denying Appellant's Motion for a Stay and Renewed Motion for a Stay also points to the insubstantiality of the decision below.

The decision of the district court is an important decision because of the immediate practical effect it will have on those many children who have been denied access to appropriate educational programs for the attempted remediation of their handicapping conditions and there will undoubtedly be some substantial impact on the special education programs offered by the Commonwealth of Virginia. However, this practical importance and beneficent impact do not raise the *legal issues* involved to the level of substantiality. Congress, in enacting Public Law 94-142, acknowledged as a reality in 1975 that "court action and State laws throughout the Nation have made it clear that the right of handicapped children is a present right, one which should be implemented immediately." 1975 U.S. Code Cong. & Admin. News 1441. This is scarcely the language of a Congress entered uncharted waters with timidity. In fact, the

very enactment of Public Law 94-142 with its requirement of a full free education for handicapped children by September 1, 1978, largely renders insubstantial the decision of the court below as the impact of the Decree and Order will only be for one year, and then the rights of the children will expand.

For many long years handicapped children have been a distinctive and identifiable subculture with few articulate spokesmen other than those intimately involved in their aspirations. Despite the unfortunately narrow scope of the district court's decision, it does represent at least a halting step toward the implementation of full rights for handicapped persons. Certainly the children impacted and their parents will benefit from the decision, but in the long run it is society itself that is the successful hidden plaintiff. Because these children may well become productive members of society able to contribute to the commonweal according to their potential. There is, however, a more basic reason for the district court's decision to be left undisturbed – it is correct, it is just, it is fair. Dr. Erik Erikson, the noted child psychologist, once remarked that "the deadliest of all possible sins is the mutilation of a child's spirit." We, all of us, have unwittingly been engaged in the mutilation of these childdren's spirits for far too long. The district court has made a small gesture toward halting the mutilation. PROMISE would not like to have to inform their members and their children that the gesture was in vain.

CONCLUSION

Wherefore, amicus curiae PROMISE respectfully urges that the questions upon which this cause depends are so insubstantial as not to need further argument, and that the decision of the district court is so patently correct, and amicus curiae respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in the cause by the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert E. Shepherd, Jr., counsel for amicus curiae PROMISE in the captioned matter and a member of the Bar of the Supreme Court of the United States, do hereby certify that on or before the 30th day of June, 1977, I mailed three copies of this Motion to Dismiss or Affirm, first-class postage prepaid, to the following counsel of record:

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